ness is not too remote an aid to the taxing power to justify its interference with the police power of the states remains to be decided. In several cases the effect of Revenue Acts of Congress upon the police power of the states has come before the Supreme Court. Notable among these is the case of *United States* v. *DeWitt*,[11] where Congress imposed a tax upon a certain kind of oil and made it a misdemeanor to sell a certain other kind of oil. Because the relation of this prohibition to the power of taxation, if any, was merely that of increasing the production of other oils on which the tax was laid, it was held to be too remote an aid to the taxing power, and, as a police regulation, relating exclusively to the internal trade of the states, to have no constitutional operation within state limits. In the *License Tax cases*,[12] Congress had imposed a "license tax" upon certain businesses. It was held that the license gave no authority to the licensee to carry on the business within a state, that Congress cannot authorize a business for the purpose of taxing it because that is too remote an aid to the power to lay and collect taxes and is repugnant to the exclusive power of the states over the same subject.

It would seem to be difficult to hold the regulations of the Harrison Act not to be in conflict with the exclusive power of the states over the same subject in the light of these decisions. If these regulations of the opium traffic and its distribution can be sustained as a means of laying and collecting taxes, what is without the scope of the power of Congress to regulate through the medium of the taxing power?

*R. H. W.*

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MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DOES A PUBLIC CHARITY FALL WITHIN THE SCOPE OF THE PENNSYLVANIA ACT?—One of the most important questions which has been raised by the Pennsylvania Workmen's Compensation Act, which has now been in operation for two months, and a question which is bound to give occasion to no little amount of discussion when it comes finally before the courts, is the question whether a public charity comes within the provisions of the act. Also if it does, but elects to reject the act, which all employers are permitted to do, is it liable in an action for damages in the same degree as before the passage of the act, which was no liability at all, or is a greater degree of responsibility imposed by the new legislation?

This question has not yet come before the courts—even those of original jurisdiction. However, there is a recent ruling of the Workmen's Compensation Board to the effect that "charitable

[11] 9 Wall., 41 (1869).
[12] 5 Wall. 462 (1866).

corporations, colleges, hospitals, *etc.*, being corporations not for profit, are employers within the meaning of the act and if they do not give to their employes the notices provided in Section 302 they will be liable for compensation under Article III".[1] But the Board has refused to rule as to the liability under Article II of a charitable corporation which rejects Article III, holding the question to be one "for determination of the courts and not the Board". This, in view of the decisions of the Pennsylvania courts before the passage of the act to the effect that charitable institutions cannot be held liable for the negligence of their servants, presents a most interesting problem. The two important questions are first, whether a charitable corporation is compelled to insure its employees, provided it does not reject Article III, and second, what is its liability at law if it does reject.

The main factors to be considered are the principles of statutory construction as laid down in Pennsylvania and the construction placed upon compensation acts in other states, the general purpose of the act, and the liability of such institutions at common law before the act was passed.

While Pennsylvania has always adhered to the general principle that statutes in derogation of the common law should be strictly construed, remedial statutes have, at the same time, been liberally construed, in order to effectuate their purpose. In *Keim* v. *City of Reading*,[2] the former rule is stated as follows: "The inference to abrogate this common law rule is not nearly so strong as the inference of an intent not to do so, to be drawn from the omission to declare, as could have been done in two or three words".[3] The latter principle is laid down in *Hartman's Appeal*[4] thus: "The statute, it is true, is remedial, and although in derogation of the common law and in some sense against common right, it is entitled to a fair interpretation in advancement of the remedy provided".[5]

With the exception of Michigan,[6] all states have construed workmen's compensation acts liberally. "The common rule as to construing legislation in derogation of the common law strictly against a purpose to change it has little or no application to the efforts to create a new system for dealing with personal injuries to employes".[7]

[1] Rule 7, p. 12, Bulletin No. 2, issued by the Workmen's Compensation Board, Feb. 1916.

[2] Super. Ct. 613 (Pa. 1907).

[3] See also Johnston's Estate, 33 Pa. 511 (1859), and Petit v. Lutz's Executor, 33 Pa. 118 (1859).

[4] 107 Pa. 327 (1884).

[5] See also Dame's Appeal, 62 Pa. 417 (1869).

[6] Andrejwski v. Wolverine Coal Co., 148 N. W. 684 (Mich., 1914).

[7] Sadowski v. Thomas Furnace Co., 146 N. W. 770 (Wis., 1914); see also Young v. Duncan, 106 N. E. 1 (Mass., 1914), and Appeal of Hotel Bond Co., 93 Atl. 245 (Conn., 1915).

"The conditions giving rise to a law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conception of the necessities of public welfare play an important part in shaping the proper administration of the legislation." [8] The purpose of the act is to create a system whereby the recovery by an employee of damages for an injury received in the course of his employment shall not be based upon any idea of negligence but upon the principle that injuries are a necessary and inevitable result of the carrying on of any business or work and that damages for such injuries are as much a legitimate part of the expense of such business as wages, improvements, moneys expended as a result of depreciation or loss by fire, *etc.*

But the real difficulty will be to get away from the Pennsylvania decisions on the liability of charities for the negligence of their servants. The leading case is *Fire Insurance Patrol* v. *Boyd,*[9] in which no recovery was allowed for the death of the plaintiff's intestate, caused by the negligence of certain patrolmen in dropping a heavy tarpaulin upon him from a fourth story window. After holding that the patrol was a public charity, Mr. Justice Paxson went on to say that it had "no property or funds which have not been contributed for the purpose of charity, and it would be against all law and equity to take those trust funds so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the patrol."

This so-called "trust fund" theory was reaffirmed in *Gable* v. *Sisters of St. Francis,*[10] where a patient in a hospital was injured by scalding water that escaped from a hot water bottle because of the negligence of a nurse. The court said: "The doctrine rests fundamentally on the fact that such liability if allowed, would lead inevitably to a diversion of the trust funds from the trust's purposes."

But in *Winnemore* v. *Philadelphia,*[11] where a stranger was injured through the negligence of the operator of an elevator in a large office building owned by the city as trustee of the Girard Estate, recovery was allowed and this case was distinguished from the Fire Patrol case on the ground that here "the act of negligence was committed by one having no connection with the charity, save only that he was assisting in the work of making income from property that was not devoted to charity."

This "trust fund" theory, which is applied in Pennsylvania, has been severely criticized, both in regard to the authenticity of its

[8] Milwaukee v. Miller, 144 N. W. 188 (Wis., 1913).
[9] 120 Pa. 624 (1888).
[10] 227 Pa. 254 (1910).
[11] 18 Pa. Super. Ct. 625 (1902).

origin [12] and by reason of the failure to apply it consistently. The cases which rely upon it almost unanimously state that while the charity is not liable for the negligence of its servants, it would be liable for the failure to exercise due care and skill in selecting its servants.[13] The great majority of jurisdictions allow a recovery to strangers and employees, but refuse it to patients, on the theory that one who accepts the benefit either of a public or of a private charity is estopped from holding his benefactor liable for the negligence of his servants in administering the charity.[14]

The parts of the Pennsylvania Act [15] involved in this discussion are Sections 103 and 202. Section 103 reads: "The term 'employer' as used in this act is declared to be synonymous with master and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it." The phrase "corporations not for profit" immediately brings to mind the classification of the Corporation Act of 1874,[16] under which the second division of corporations not for profit are those for "the support of any benevolent, charitable, educational or missionary undertaking." This is the basis of the ruling made by the Workmen's Compensation Board. The argument against this ruling, based upon *Keim* v. *Reading* [17] and *Fire Patrol* v. *Boyd,*[18] is that if charities had been intended to be included within the scope of the act, they would have been specifically mentioned in Section 103.[19] The supporters of this view point to other instances in which charities have been favored by the law, such as their exemption from taxation,[20] the non-applicability of the rule against perpetuities,[21] *etc.* However, it should be noted that all restrictions placed upon the purview of the act have been made in

[12] Hearns v. Waterbury Hospital, 66 Conn. 98 (1895). See also article by Hon. John Marshall Gest, Public Charities and the Rule of *Respondeat Superior,* 37 Am. Law. Reg. 669; and a reply thereto by Hon. Richard C. McMurtrie, 38 Am. Law Reg. 209.

[13] Kellogg v. Church Foundation, 112 N. Y. Supp. 566 (1908); St. Paul's Sanitarium v. Williamson, 164 S. W. 36 (Tex., 1914); Ill. Central R. R. v. Buchanan, 103 S. W. 272 (Ky., 1907).

[14] Powers v. Massachusetts Hospital, 47 C. C. A. 133 (1901). See also Bruce v. M. E. Church, 147 Mich. 230 (1907); Basabo v. Salvation Army, 85 Atl. 120 (R. I., 1912); Hospital of St. Vincent de Paul v. Thompson, 81 S. E. 13 (Va., 1914).

[15] Act of June 2, 1915, P. L. 736.

[16] Act of April 29, 1874, P. L. 73.

[17] *Supra,* note 2.

[18] *Supra,* note 6.

[19] See article by Henry A. Hoefler, Esq., in "The Legal Intelligencer," Vol. 73, No. 2, p. 26.

[20] Northampton County v. Lafayette College, 120 Pa. 132 (1889).

[21] Biscoe v. Thweatt, 74 Ark. 545 (1905).

the emuneration of employes and not in the emuneration of employers.[22]

Section 202 reads: "The employer shall be liable for the negligence of all employes while acting within the scope of their employment, including engineers, chauffeurs, miners, mine-foremen, . . . and all other employes licensed by the State or other governmental authority, if the employer be allowed by law the right of free selection of such employes from the class of persons thus licensed." It has been strenuously argued that this section was embodied in the act merely for the purpose of overruling the so-called "mine-foremen" cases and that the enumeration after the word "including" is explanatory and restrictive, thus limiting the scope of the section. It is submitted, however, that the section is general and includes "all employes", on the ground that by taking away the old defenses available to the employer, the legislature has shown its intention to be that the difference between the remedy at law and under the act should be as small as possible and that the principle of compensation should be incorporated into the common law to as great a degree as possible, superseding the old idea of negligence. Under this view, the enumeration following the word "including" is merely surplusage and added to remove all doubt as to the overruling of the "mine-foremen" cases.

Section 201, which abolishes the defenses of contributory negligence, voluntary assumption of risk, and negligence of a fellow-servant, is not difficult of construction after the two sections just discussed have been disposed of. The defenses have been abolished as to every action by an employe for injuries received by him in the course of his employment, which he might bring either by reason of the common law before the act or by virtue of an extension of the remedy at law under the act, if there be any. If no action lies, the abolition of the defense is of no consequence.

*P. C. W.*

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TORTS—LIABILITY OF CITIES AND COUNTIES FOR FAILURE TO REPAIR HIGHWAYS AND BRIDGES—Although there is some authority to support a contrary doctrine, the great weight of opinion is in favor of the view that for failure to keep highways and bridges in repair there is an implied common law liability for resulting damages, resting upon every chartered municipality.[1]

The courts of New England are the chief upholders of the theory that no such liability attaches even to a chartered city unless

[22] Section 104, *supra*, note 16; see also Act of June 3, 1915, P. L. 777.

[1] District of Columbia v. Woodbury, 136 U. S. 450 (1889); City of Muncie v. Hey, 164 Ind. 570 (1905); Brewer v. New York, 52 N. Y. S. 865 (1898).